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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

TONY OLIVAS-DEAN, Plaintiff, Appellant and Cross-Respondent, v. AMERICAN MEIZHOU DONGPO GROUP, INC., Defendant, Respondent and Cross-Appellant.	B284933 (Los Angeles County Super. Ct. No. BC581538)

APPEAL from an order of the Superior Court of Los Angeles County. Frederick P. Shaller, Judge. Affirmed in part, reversed in part, and remanded with directions.

Lyon Law and Geoffrey C. Lyon for Plaintiff, Appellant and Cross-Respondent.

WHGC and Michael G. York for Defendant, Respondent and Cross-Appellant.

A jury awarded damages to plaintiff Tony Olivas-Dean after it found in his favor on two claims for failing to prevent discrimination and retaliation in violation of the Fair Employment and Housing Act (Gov. Code, § 12940, subds. (j), (k);[1] FEHA) and for common law wrongful termination in violation of public policy against his former employer, American Meizhou Dongpo Group, Inc. (American). After the verdict, the trial court reduced certain damages as duplicative and entered judgment, which included a finding Olivas-Dean was entitled to attorney fees without specifying an amount. The court then granted a motion for judgment notwithstanding the verdict (JNOV) vacating the verdict on the FEHA failure to prevent claim. In a post-judgment order, the trial court denied Olivas-Dean's request for fees, given the court vacated the verdict on his FEHA claim. Olivas-Dean appeals, challenging those rulings.

We affirm in part, reverse in part and remand. We reverse the JNOV because the jury found facts sufficient to support the failure to prevent retaliation cause of action. We affirm the trial court's reduction of damages on that claim. We will remand for the trial court to reinstate the original judgment consistent with this opinion. Further, because the original judgment included Olivas-Dean's entitlement to attorney fees but did not fix the amount, we will direct the trial court to hold further proceedings on the amount of fees.

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[1] All undesignated statutory citations refer to the Government Code unless otherwise specified.

Defendant American cross-appeals, contending the trial court erred in permitting Olivas-Dean's expert witness to testify regarding American's financial condition in the punitive damages phase. We find no abuse of discretion.

BACKGROUND

We provide only general background here and will set forth further details in the discussion section. Olivas-Dean was employed by American as a server. He alleged he was subjected to a pattern of harassing and discriminatory treatment based on his sex, sexual orientation, and disability during his employment and American retaliated against him when he complained. He was eventually terminated. He filed a complaint against American and two individual managers alleging a host of employment-related claims.

Six of those causes of action proceeded to trial before a jury, divided into 10 claims against American and the individual managers. In two verdict forms, the jury found in favor of defendants on claims for retaliation; failure to make reasonable accommodations; failure to engage in the interactive process; disability discrimination; battery; and sexual harassment. The jury found in favor of Olivas-Dean on claims against American for wrongful termination in violation of public policy and failure to prevent discrimination or retaliation under the FEHA (§ 12940, subds. (j), (k).) For each of those claims, the jury awarded $80,000 for past lost earnings and $20,000 for past non-economic loss. The jury also found agents for American acted with "malice, oppression, or fraud" for the purpose of punitive damages. Four days after the jury returned the verdict, the court held a second trial phase on the amount of punitive damages, and the jury awarded $250,000 to Olivas-Dean.

Olivas-Dean submitted a proposed judgment that contained a total compensatory damages award of $200,000. American objected, arguing Olivas-Dean was only entitled to $100,000 as damages for his discharge, even though the jury found in his favor on two different legal theories and appeared to award $100,000 on each of those theories. The trial court partially agreed; it found the damages were awarded based on two different wrongs, but found the award of $80,000 in past lost wages for the failure to prevent cause of action was duplicative.

On June 6, 2017, the court entered judgment on the verdicts, awarding Olivas-Dean $370,000 ($100,000 in damages on the wrongful termination claim, $20,000 in damages on the failure to prevent claim, and $250,000 in punitive damages). The judgment awarded costs and attorney fees to Olivas-Dean, but did not set amounts. A notice of entry of judgment was filed on July 5, 2017.

American moved for JNOV and a new trial. In both motions, American argued the verdict on the failure to prevent claim was inconsistent because the jury found no retaliation or discrimination, yet found American failed to prevent retaliation or discrimination. It also argued insufficient evidence supported the verdict on wrongful termination. In the new trial motion, American added the argument that it was entitled to a new trial on punitive damages because the court improperly allowed Olivas-Dean's expert witness to testify during the punitive damages phase.

On August 16, 2017, Olivas-Dean moved for costs, as well as $989,568.10 in attorney fees based on the FEHA attorney fees provision in § 12965, subdivision (b). The court did not immediately rule on that request.

On August 21, 2017, the court denied the new trial motion, rejecting American's challenge to Olivas-Dean's punitive damages expert. It granted the JNOV motion on the FEHA failure to prevent claim, agreeing with American the finding on the claim for failure to prevent discrimination and retaliation was irreconcilable with the rest of the jury's verdict. It denied JNOV on the wrongful termination claim.

Olivas-Dean filed a notice of appeal on September 1, 2017. After he filed his notice of appeal, the court entered an amended judgment on September 13, 2017, awarding total damages of $350,000 ($100,000 on the wrongful termination claim and $250,000 in punitive damages).[2] The court again awarded costs and attorney fees to Olivas-Dean but left the amounts blank.

American filed a notice of cross-appeal on September 18, 2017.

On December 19, 2017, Olivas-Dean filed an amended motion for attorney fees. Because he had no surviving FEHA claim and the only claim on which he prevailed after the JNOV was for common law wrongful termination, he argued he was entitled to statutory fees based on 42 U.S.C., § 1988, and Code of Civil Procedure section 1021.5, as well as section 12965, subdivision (b). The court denied the motion for attorney fees on January 12, 2018, finding no statutory basis for a fees award, given Olivas-Dean's only remaining claim was for common law wrongful termination. Olivas-Dean did not file a second notice of appeal identifying the court's order denying attorney fees.

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[2] Confusingly, this amended judgment still recited the jury's award of $100,000 on the failure to prevent claim, but it noted the court granted JNOV on that claim, so the total damages award was $350,000.

DISCUSSION

Olivas-Dean's Appeal

I. The Trial Court Erred in Granting JNOV on Olivas-Dean's Failure to Prevent Claim

We review the ruling on a JNOV motion using "the same standard the trial court uses in ruling on the motion, by determining whether it appears from the record, viewed most favorably to the party securing the verdict, that any substantial evidence supports the verdict. ' " 'If there is any substantial evidence, or reasonable inferences to be drawn therefrom in support of the verdict, the motion should be denied.' " ' " (*Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 284 (*Trujillo*).) Generally, " ' "[t]he purpose of a motion for judgment notwithstanding the verdict is not to afford a review of the jury's deliberation but to prevent a miscarriage of justice in those cases where the verdict rendered is without foundation." [Citation.]' " (*Ibid.*)

The issue of whether the FEHA failure to prevent cause of action can be sustained is essentially one of law, which we review de novo. (*Dickson v. Burke Williams, Inc.* (2015) 234 Cal.App.4th 1307, 1312 (*Dickson*).) "With a special verdict, we do not imply findings on all issues in favor of the prevailing party, as with a general verdict. [Citation.] The verdict's correctness must be analyzed as a matter of law." (*Trujillo, supra,* 63 Cal.App.4th at p. 285.) However, " ' "[a] verdict should be interpreted so as to uphold it and give it the effect intended by the jury. . . ." ' [Citation.] Where special verdicts appear inconsistent, if any conclusions could be drawn which would explain the apparent conflict, the jury will be deemed to have drawn them." (*Wysinger*

v. Automobile Club of Southern California (2007) 157 Cal.App.4th 413, 424 (*Wysinger*).)

In the two special verdict forms, the jury returned a defense verdict on Olivas-Dean's discrimination, sexual harassment, and retaliation claims. The jury found in Olivas-Dean's favor on claims for common wrongful termination and FEHA failure to prevent retaliation or discrimination. As relevant here, the jury specifically found as follows:

For the wrongful termination claim, the jury responded "yes" to this question: "Was Tony Olivas-Dean's alleged making a complaint of harassment or discrimination to a manager of American Meizhou Dongpo or to the EEOC or the California Department of Fair Employment and Housing a substantial motivating reason for American Meizhou Dongpo, Inc.'s decision to discharge Tony Olivas-Dean?"

For the retaliation claim, the jury responded "yes" to this question: "Did Tony Olivas-Dean complain to the EEOC about the alleged harassment or discrimination at American Meizhou Dongpo?" The jury responded "no" to the questions, "Did Tony Olivas-Dean report an alleged injury to American Meizhou Dongpo?" and "Did Tony Olivas-Dean request help moving tables to minimize his injury at American Meizhou Dongpo?" The jury also answered "no" to the question: "Was Tony Olivas-Dean's complaint to the EEOC, his reporting an alleged injury, and/or requesting help moving tables to minimize his injury, a substantial motivating reason for his discharge?"

For the failure to prevent claim, the jury responded "yes" to these two questions: "Did American Meizhou Dongpo, Inc. fail to take all reasonable steps to prevent the alleged discrimination or retaliation?" and, "Was American Meizhou Dongpo, Inc.'s failure

to prevent the alleged discrimination or retaliation a substantial factor in causing harm to Tony Olivas-Dean?"

The trial court granted JNOV on the failure to prevent cause of action because it found the verdict was inconsistent with the jury's findings that Olivas-Dean was not subject to any harassment, discrimination, or retaliation. In the court's words, "you cannot prevent what did not happen. The jury stated that retaliation did not happen. How then could [American] have prevented it?"

Section 12940, subdivision (k) creates liability for an employer who "fail[s] to take all reasonable steps necessary to prevent discrimination and harassment from occurring."[3] The trial court was correct that, as a legal matter, a claim under this provision cannot stand in light of a finding of no underlying actionable discrimination or harassment. (See *Dickson, supra,* 234 Cal.App.4th at pp. 1314–1317; *Trujillo, supra,* 63 Cal.App.4th at pp. 288–289.) The same logic applies to a claim for failing to prevent retaliation when no retaliation occurred. (See *Jumaane v. City of Los Angeles* (2015) 241 Cal.App.4th 1390, 1410 .)

Like the trial court, American takes the position that because the jury found in its favor on Olivas-Dean's *separate* claims of retaliation and discrimination, the jury's finding on the failure to prevent discrimination or retaliation claim cannot stand. Olivas-Dean, however, points out the jury's findings on

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[3] The term "discrimination" in this subdivision has been interpreted to include retaliation. (*Taylor v. City of Los Angeles Dept. of Water & Power* (2006) 144 Cal.App.4th 1216, 1240, disapproved on other grounds in *Jones v. Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 1173–1174.)

wrongful termination rested on facts that showed retaliation on three grounds—discharge in response to his complaints of harassment or discrimination (1) to a manager of American; (2) to the EEOC; *or* (3) to the California DFEH. For the retaliation claim, the jury found only *one* of those grounds was not a substantial motivating reason for his discharge—complaints to the EEOC. Olivas-Dean argues the jury's affirmative answer to the wrongful termination claim constituted a finding that Olivas-Dean was subject to retaliation on either of the two grounds not contained in the stand-alone retaliation claim. As a result, the jury could have relied on that finding to conclude American failed to prevent retaliation.

Under the unique circumstances here, we agree with Olivas-Dean. American has cited no case law requiring a jury to find in the plaintiff's favor on a *formally separate* cause of action for retaliation or discrimination before finding the defendant failed to prevent retaliation or discrimination. The case law only requires the jury find *actionable* wrongful conduct that *actually* occurred. The court in *Trujillo* explained that a claim for failing to prevent discrimination under section 12960, subdivision (k) is a "tort made actionable by statute," so the question is "whether the usual elements of a tort, enforceable by private plaintiffs, have been established: defendants' legal duty of care toward plaintiffs, breach of duty (a negligent act or omission), legal causation, and damages to the plaintiff." (*Trujillo, supra,* 63 Cal.App.4th at pp. 286–287.) The defendants owed no legal duty to prevent discrimination or harassment when no underlying discrimination or harassment *actually* occurred: "Employers should not be held liable to employees for failure to take

necessary steps to prevent such conduct, except where the actions took place and were not prevented." (*Id.* at p. 289.)

In *Dickson*, the court rejected the plaintiff's argument that the jury's verdict on a failure to prevent harassment claim could be sustained because the jury found unwanted sexual harassment actually occurred, but concluded it was not "severe or pervasive" as required to be actionable under the FEHA. (*Dickson, supra,* 234 Cal.App.4th at pp. 1314–1315.) Interpreting *Trujillo*, the court reasoned "it was the absence of actionable harassment that precluded the cause of action for failure to take reasonable steps necessary to prevent the harassment, not simply the lack of any harassing conduct at all. As the court noted, '[T]here is a significant question of how there could be legal causation of any damages (either compensatory or punitive) from such a statutory violation, where the only jury finding was the failure to prevent *actionable* harassment . . . , which, however, did not occur.' " (*Dickson, supra,* at p. 1315.) The *Dickson* court reached the same conclusion for the plaintiff's failure to prevent sex discrimination claim because the jury found no adverse employment action for the plaintiff's sex discrimination claim. (*Dickson, supra,* at pp. 1317–1318; see *Thompson v. City of Monrovia* (2010) 186 Cal.App.4th 860, 880 [citing related clause in § 12940, subd. (j)(1) and stating "because the statute does not create a stand-alone tort, the employee has no cause of action for a failure to investigate unlawful harassment or retaliation, unless actionable misconduct occurred"].)

Here, as part of the wrongful termination claim, the jury found all the facts to show actionable retaliation actually occurred based on Olivas-Dean's complaints to a manager or the DFEH. To prove a claim of retaliation under the FEHA, a

plaintiff must show "(1) he or she engaged in a 'protected activity,' (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer's action." (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042 (*Yanowitz*).) A "protected activity" includes complaining of or opposing conduct "that the employee reasonably believes to be discriminatory, even when a court later determines the conduct was not actually prohibited by the FEHA." (*Id.* at p. 1043.) Discharge is unquestionably an adverse employment action under the FEHA. (§ 12940, subd. (h) [unlawful for employer to "*discharge*, expel or otherwise discriminate against any person because the person has opposed any practices forbidden under this part" or "filed a complaint . . . in any proceeding under this part," italics added].) And the causal link required is proof the protected activity was a " 'substantial motivating factor' " in the discharge. (*Alamo v. Practice Management Information Corp.* (2013) 219 Cal.App.4th 466, 478; CACI No. 2505.) The jury necessarily found all of these elements when it answered "yes" to the question of whether Olivas-Dean's "alleged making a complaint of harassment or discrimination" to a manager or the DFEH was "a substantial motivating reason" for his discharge.

This conclusion is reinforced by the nature of Olivas-Dean's wrongful termination claim. It required proof of a termination that violated a substantial public policy delineated in a statutory provision. (*City of Moorpark v. Superior Court* (1998) 18 Cal.4th 1143, 1159.) No statute was cited in the verdict form or jury instructions, but Olivas-Dean's complaint alleged his discharge violated public policies embodied in "Government Code §§ 12920, 12940, 12948, see 12926 (employment discrimination and

retaliation); Cal. Const. Art. I, § 8 (employment discrimination)." The jury instruction for the public policy element of this claim required a finding "[t]hat Tony Olivas-Dean's opposition to sexual harassment or having a disability was a motivating reason for Tony Olivas-Dean's discharge." That language mirrored the language in the FEHA retaliation provision prohibiting discharge "because the person has opposed any practices forbidden under this part." (§ 12940, subd. (h).) Thus, to find for Olivas-Dean on his wrongful termination claim claim, the jury necessarily had to find an actionable claim for retaliation against American in violation of the FEHA.

American's contrary arguments are unpersuasive. American repeatedly argues we must presume Olivas-Dean submitted the special verdict forms so they should be construed against him, but his only authority—sections of a secondary source practice guide—does not support that proposition. Nor has American explained why it did not simply cite the part of the record indicating who submitted the verdict forms or explain why the record is silent on that point.

American also argues the jury returned a special rather than general verdict, so findings are not implied in favor of Olivas-Dean because " ' "the jury must resolve every controverted issue." ' " (*Trujillo, supra,* 63 Cal.App.4th at p. 285.) American contends we would violate that principle if we imply the jury found American retaliated against Olivas-Dean for complaining to the DFEH or a manager. As we have explained, we are not implying any findings; the jury was asked and expressly found all the factual elements for retaliation, albeit in the context of Olivas-Dean's wrongful termination claim. We are simply applying our standard of review that, "if any conclusions could be

drawn which would explain the apparent conflict, the jury will be deemed to have drawn them." (*Wysinger, supra,* 157 Cal.App.4th at p. 424.)[4]

Further, American contends a finding of retaliation based on complaints to the DFEH but not complaints to the EEOC would be "nonsensical" because Olivas-Dean's EEOC complaint was forwarded to the DFEH. Regardless, the jury's wrongful termination finding could have been based on retaliation for complaining to managers, a separate ground identified in the special verdict form.

Next, American argues the verdict cannot be sustained because the jury found no harassment and the verdict form did not ask the jury whether Olivas-Dean reasonably believed harassment occurred. Again, retaliation can be based upon complaining of or opposing conduct "that the employee reasonably believes to be discriminatory, even when a court later determines the conduct was not actually prohibited by the FEHA." (*Yanowitz, supra,* 36 Cal.4th at p. 1043.) Although the jury found against Olivas-Dean on his discrimination and harassment claims, the jury was instructed as part of the retaliation claim that Olivas-Dean "does not have to prove harassment or discrimination in order to be protected from retaliation. If he reasonably believed he had been sexually harassed, and opposed it, or reasonably believed he was disabled

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[4] American cites *Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, but it is readily distinguishable. Unlike here, the court in that case refused to imply factual findings to support a punitive damages award when the jury was only asked and only resolved a single claim for breach of contract. (*Id.* at pp. 960–961.)

and requested accommodation, he may prevail on a retaliation claim even if he does not present, or prevail on, a separate claim for harassment or discrimination." The jury was instructed it "must consider all of the instructions together," so the jury was adequately informed it could find retaliation by finding Olivas-Dean reasonably believed he was subjected to harassment or discrimination. The jury must have reached that conclusion when it found Olivas-Dean's "alleged making a complaint of harassment or discrimination" to the DFEH or a manager was a substantial motivating factor in his discharge.

Finally, American argues Olivas-Dean was not prejudiced by the granting of the JNOV because the damage award on this claim was duplicative of the damage award on the wrongful termination claim, an issue we address below. Here, American's argument is meritless because American only addresses the $80,000 in economic damages for past lost wages and not the additional $20,000 in past non-economic damages Olivas-Dean lost when the trial court granted JNOV. American also contends Olivas-Dean was not prejudiced because he is not entitled to attorney fees. That contention assumes we would uphold the JNOV on the FEHA failure to prevent claim, and instead we are reinstating the original judgment that found Olivas-Dean was entitled to FEHA attorney fees.

Thus, the trial court erred in granting JNOV on Olivas-Dean's failure to prevent claim, and the jury's verdict must be reinstated.

II. The Trial Court Correctly Struck $80,000 in Past Lost Earnings on the Failure to Prevent Claim

Olivas-Dean contends the trial court erred by striking $80,000 in past lost earnings on his failure to prevent claim as duplicative of the $80,000 in past lost earnings on his wrongful termination claim. The trial court struck the damages based on the following reasoning: The court interpreted the verdict on the wrongful termination claim to rest on Olivas-Dean's termination for complaining to the EEOC. It concluded this claim and the failure to prevent claim were "fundamentally different and are not based upon the same facts" because "[t]he discrimination of which Plaintiff was complaining predated and was the subject of the EEOC complaint. Then, after the EEOC complaint was filed, the evidence supports the orchestrated acts leading to the discharge. [¶] The court interprets the jury verdict form to indicate that damages were awarded for two different wrongs: failure to prevent the discrimination or retaliation that led to the filing of the EEOC complaint and then termination due to the filing of the complaint with the EEOC."

From that premise, the court struck the $80,000 in past lost earnings for the failure to prevent discrimination claim because the evidence showed Olivas-Dean suffered "no economic loss of any significance until the termination." In reaching this conclusion, the trial court reasoned: "[Olivas-Dean] testified that he lost income during the period between 12/2013 and 6/2014 when he was supervised by JP Hernandez who allegedly retaliated against him for resisting his harassment. Plaintiff testified that [Hernandez] cut his shifts and would move Plaintiff to the non-busy portions of the restaurant and then also moved Plaintiff from the more lucrative night shifts to day shifts.

He stated that this greatly affected his income and that sales decreased significantly by 50%. However, Plaintiff also testified that his payroll records reflect that he actually made more income during this time that he was supervised by [Hernandez], which Plaintiff explained was due to seeking and securing additional unassigned shifts from his co-workers with his supervisor's approval. Mr. Kahr's, defendants' expert testified, supported by payroll records, that there were no economic damages during the time Mr. Olivas-Dean was working at [American]."

The premise of the trial court's analysis is flawed because, as we explained above, the jury's finding of no liability on the retaliation question meant it found Olivas-Dean's complaint to the EEOC was *not* a "substantial motivating reason" for his discharge. The trial court also appears to have *weighed* contradictory testimony from Olivas-Dean and the defense expert on Olivas-Dean's lost earnings prior to termination to find no evidence to support the damages award. (Cf. *Trujillo, supra,* 63 Cal.App.4th at p. 284 [verdict upheld if supported by any substantial evidence].)

Nonetheless, we may affirm on other grounds presented in the record. (*Mike Davidov Co. v. Issod* (2000) 78 Cal.App.4th 597, 610 (*Mike Davidov*).) The trial court properly struck the $80,000 in damages for a simpler reason. " 'Regardless of the nature or number of legal theories advanced by the plaintiff, he is not entitled to more than a single recovery for each distinct item of compensable damage supported by the evidence. [Citation.] Double or duplicative recovery for the same items of damage amounts to overcompensation and is therefore prohibited. [Citation.] [¶] . . . [¶] In contrast, where separate items of

compensable damage are shown by distinct and independent evidence, the plaintiff is entitled to recover the entire amount of his damages, whether the amount is expressed by the jury in a single verdict or multiple verdicts referring to different claims or legal theories.' " (*Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 702, quoting *Tavaglione v. Billings* (1993) 4 Cal.4th 1150, 1158–1159 (*Tavaglione*).)

Although the jury found in Olivas-Dean's favor on two separate legal theories—wrongful termination and failure to prevent retaliation—the jury awarded $80,000 on each claim for a single *specific* category of past economic damages identified as "Past Lost earnings." In the jury instructions, the jury was told, "To recover damages for past lost earnings, Tony Olivas-Dean must prove the amount of earnings and wages that he has *lost to date*." (Italics added.) For the wrongful termination claim specifically, the jury was instructed to "[d]ecide the amount that Tony Olivas-Dean *would have earned up to today*, including any benefits and pay increases." (Italics added.) There logically could have been only one amount of past earnings Olivas-Dean had "lost to date" or "would have earned up to today," regardless of any dividing line between losses occurring before or after his termination or the number of theories causing that loss. The jury's award must have been duplicative. (See *Tavaglione, supra,* 4 Cal.4th at p. 1159 ["Thus, for example, in a case in which the plaintiff's only item of damage was loss of commissions, two awards of damages identical in amount—one for breach of contract and the other for bad faith denial of the same contract—could not be added together in computing the judgment. Plaintiff was entitled to only *one* of the awards," citing *DuBarry Internat., Inc. v. Southwest Forest Industries, Inc.* (1991) 231 Cal.App.3d

552, 563–565 and *Walker v. Signal Companies, Inc.* (1978) 84 Cal.App.3d 982, 995–996].)

To argue separate awards were supported by independent evidence, Olivas-Dean attempts to draw the same line as the trial court drew between his alleged losses before and after his termination. He claims there was evidence of American's actions while he was working there that allegedly caused him to lose income and argues "[a]ll told, this evidence demonstrated that [his] income was reduced by half for about eight months of his employment." He then argues there was independent post-termination evidence that he could not work for around two and a half years after his termination—from December 1, 2014 through April 2017—and could not return to his occupation as a server.

Assuming without deciding that he has accurately summarized the trial record, there are two problems with his position. First, he points to nothing indicating the jury was instructed to separately consider his pre- and post-termination evidence and apportion his past lost wages accordingly to each claim. Instead, the jury was expressly told that past lost wages should account for earnings Olivas-Dean has "lost to date" and "would have earned up to today."

Second, Olivas-Dean's own summary of the trial evidence cannot justify a separate loss of $80,000 in pre-termination wages. His annualized earnings at American were approximately $40,700. After he was terminated, he was out of work for around two and a half years. It made logical sense that the jury would award *post-termination* lost wages of $80,000, which was two years of his annual earnings. But it does not make logical sense that the jury would *also separately* award the equivalent of two years of annual earnings for pre-termination losses, which even

by Olivas-Dean's own measure amounted to a loss of half his earnings for eight months, or approximately $13,000.[5]

The record also belies any inference the awards were separate. Olivas-Dean's expert only calculated lost earnings after termination, which amounted to around $100,000. And in closing, Olivas-Dean's counsel did not argue for separate categories of past lost wages. He merely told the jury: "And what are the damages? The damages for past lost wages are $100,000 up to the present. The damages for future lost wages are up to $100,000, but you can decide if it's more or if it's less."

The only rational interpretation of the jury's verdict is that a second award of $80,000 in past lost wages on the failure to prevent claim was duplicative. It was therefore properly stricken.

III. The Trial Court Must Address Attorney Fees on Remand

Olivas-Dean attempts to challenge the trial court's post-judgment denial of attorney fees after the court granted JNOV on the only FEHA claim the jury found in Olivas-Dean's favor. We agree with American that Olivas-Dean was obligated to separately appeal that post-judgment order to enable him to challenge it on appeal. (*Soldate v. Fidelity National Financial, Inc.* (1998) 62 Cal.App.4th 1069, 1073.)

However, the *original* judgment—entered prior to the court's ruling on the JNOV motion—contained a finding that Olivas-Dean was entitled to attorney fees without setting an amount. Olivas-Dean properly appealed the original judgment and the order granting JNOV. American does not dispute that if

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[5] That amount is calculated as follows: $40,000 per year ÷ 12 ÷ 2 x 8 = $13,333.33.

we reverse the JNOV ruling and reinstate Olivas-Dean's FEHA claim, he would be entitled to FEHA attorney fees as provided in the original judgment. Thus, on remand, the trial court should conduct further proceedings to determine the amount of FEHA attorney fees to which Olivas-Dean is entitled.

American's Cross-Appeal

American cross-appeals, arguing the trial court improperly permitted Olivas-Dean's financial expert Timothy Lanning to testify during the punitive damages phase. We review the trial court's decision for abuse of discretion. (*Dickison v. Howen* (1990) 220 Cal.App.3d 1471, 1476; see *Boston v. Penny Lane Centers, Inc.* (2009) 170 Cal.App.4th 936, 950 (*Boston*).) We find none.

A. Background

Lanning was designated on Olivas-Dean's expert witness list to testify regarding "economic losses to Plaintiff caused by termination and other adverse employment actions by Defendant, including past and future lost wages, medical expenses and damage to credit and related losses and the bases therefore." Lanning testified in the liability phase of trial regarding Olivas-Dean's lost earnings.

The jury rendered its verdict on Thursday afternoon, April 20, 2017. The verdict included a finding that American's managers and agents had acted with "malice oppression, or fraud," necessitating a trial on punitive damages. The court set the punitive damages phase for the following Monday, April 24, 2017, and ordered the parties to meet and confer regarding American's production of financial records. The parties discussed possible witnesses for the punitive damages phase, and when Olivas-Dean suggested he would subpoena American's owners to testify, American indicated they were in China. Olivas-Dean

then indicated he had a subpoena for American's business records and he would "ask Mr. Lanning to come back." The court indicated that "sounds fair." The court expressed the desire to "expedite this because I don't want to lose these jurors if we don't get it done on Monday then I'm quite concerned that we might have to impanel a whole new jury on the issue of punitive damage only, which obviously requires mostly trying the whole case again."

No agreement was reached on the production of financial records, so the next morning—Friday, April 21, 2017—Olivas-Dean filed an ex parte application to compel American to produce its financial records. The application was supported by a declaration from Lanning indicating he had been "retained by Plaintiff to testify in the punitive damage phase of the trial on April 24, 2017." Olivas-Dean also attached emails his counsel sent to American's counsel on the prior evening of April 20, 2017 that explained Lanning needed the financial documents "to state his opinion as to the worth of [American]. He will be our witness Monday morning [for] the punitive damages phase." In subsequent emails that evening, American did not mention Lanning or object to his appearance.

Olivas-Dean also noted in the ex parte application that he had served a subpoena on American on March 27, 2017—over three weeks before the verdict—which requested American's financial records expressly in preparation for a possible punitive damages phase. American objected to the subpoena because the materials were "premature and irrelevant" until the jury returned a verdict in Olivas-Dean's favor. It cited Civil Code section 3295, subdivision (d), which, upon application of a defendant, prevents the "admission of evidence of that

defendant's profits or financial condition until after the trier of fact returns a verdict for plaintiff awarding actual damages and finds that a defendant is guilty of malice, oppression, or fraud."

The court held a hearing on the ex parte, but a transcript of the hearing was not included in the appellate record. The court granted Olivas-Dean's ex parte application. American complied with the order and produced financial statements. Olivas-Dean offered to produce Lanning for a deposition on the intervening Saturday, Sunday, or Monday morning before the punitive damages phase began. American chose not to depose Lanning.

On Monday before trial, American objected to Lanning's testimony because he was not designated as an expert on American's financial condition. Olivas-Dean's counsel commented that the parties had discussed the substance of Lanning's testimony "on Friday." Apparently American had also made the same motion on that Friday, and Olivas-Dean's counsel confirmed American's counsel was "informed on Friday that if he wanted to take the deposition of Mr. Lanning over the weekend or this morning, the court would order that. And [American's counsel] declined to take that option. So, the specific relief being now requested by the defense was offered about 72 hours ago, and they didn't take advantage of it." American's counsel conceded it did not take Lanning's deposition and complained the weekend was insufficient time to find and prepare its own expert.

The court overruled American's objection. It confirmed Lanning's testimony would be limited to the financial documents produced by American on the prior Friday. The court noted the quick timeline, stating it "cannot hold this jury forever. And I think we came to a reasonable accommodation to give a day off to get prepared. [¶] I did offer to be available to issue orders

regarding a deposition of Mr. Lanning. I did suggest the deposition be taken. That was the opportunity that the defense had to do it. And, I think, having not taken up on that offer, I offered to order it, and my indication that it should be taken is a form of a waiver. But you still have the opportunity to have an expert sit in, in the trial and listen to his testimony. And I'll give you some time to rebut it. And if you need to take a break and figure out a way around it; or, have your own people testify in response after hearing it. But, frankly, there is no other reasonable way to do this, other than to power forward. And I don't think it is inappropriate to have the same witness, that [Olivas-Dean's counsel] has a relationship, testify on the limited issue of financial condition."

Lanning testified on Monday, April 24, 2017. American cross-examined him but did not call any witnesses.

In its new trial motion, American again raised the issue of Olivas-Dean's failure to designate Lanning as a witness on American's financial condition. The court rejected the argument as follows: "Mr. Lanning was not disclosed as an expert on the financial condition of the Defendant for purposes of the . . . determination of punitive damages since to do so would have been pointless before a finding of malice was made by the jury. Civil Code section 3295, subdivisions (a)(1) and (c) preclude a plaintiff from conducting pretrial discovery to obtain evidence of financial condition to support a punitive damages claim without a court order. In order to obtain such an order, a plaintiff must establish 'a substantial probability' of prevailing on the claim. (Civ. Code, § 3295, subd. (c).) Thus, no pretrial discovery on the issues, was permitted, in the absence of a court order. After the verdict on liability and damages were returned

this court at the end of Phase I of the trial, the court issued an order on April 20, 2017 directing defendants to produce evidence of their financial condition by April 21, 2017, the following day. Thus, there was no pretrial evidence on which a witness could base an opinion prior to the trial court's post-verdict order.

"Once defendants complied with the order and produced financial statements, plaintiff offered to submit Mr. Lanning for a deposition on Saturday, Sunday or Monday morning before resumption of trial. Defendants declined plaintiff's offer. Defendants knew that plaintiffs intended to request a punitive damages award. Defendant knew or should have known that plaintiff would call a witness to counter the financial condition information which was produced by Defendants. As Defendant chose not to take the deposition of Mr. Lanning on his opinions as to the financial condition of the Defendant as offered, Defendants are in no position to claim surprise as to Lanning's testimony.

"Due to the unavailability of financial condition evidence before the date of the verdict on Phase I of the trial, the issue raised in the motion for new trial that the original expert designation was deficient is really irrelevant to the issue before the court.

"The court maintains that Defendant waived any objection to the testimony when it voluntarily chose not to take advantage of the offer to take the deposition of Mr. Lanning before he testified. Since new evidence was first available after the finding of malice the court does not find it to be unreasonable to allow the expert testimony, especially when the deposition of the expert is offered and declined."

B. The Court Acted Well Within Its Discretion in Allowing Lanning to Testify

As relevant here, "[o]n motion of any party who has engaged in a timely exchange of expert witness information, the court may grant leave" to "[a]mend that party's expert witness declaration with respect to the general substance of the testimony that an expert previously designated is expected to give." (Code Civ. Proc., § 2034.610, subd. (a)(2).) The motion to amend the expert declaration must be made "at a sufficient time in advance of the time limit for the completion of discovery . . . to permit the deposition of any expert to whom the motion relates to be taken within that time limit," but "[u]nder exceptional circumstances, the court may permit the motion to be made at a later time." (Code Civ. Proc., § 2034.610, subd. (b).) The moving party must fulfill certain requirements delineated by statute in order to obtain permission to amend an expert witness designation. (Code Civ. Proc., § 2034.620.)[6]

"To expand the scope of an expert's testimony beyond what is stated in the declaration, a party must successfully move for leave to amend the declaration under" these provisions. (*Bonds v. Roy* (1999) 20 Cal.4th 140, 149 (*Bonds*); *Richaud v. Jennings* (1993) 16 Cal.App.4th 81, 90.) However, when a party fails to comply with these provisions, exclusion of the expert's testimony is only required when the noncompliance is

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[6] We reject Olivas-Dean's argument that his ex parte application could be construed as a motion pursuant to Code of Civil Procedure section 2034.610. There is an exhaustive statutory list of conditions to grant leave to amend an expert witness list, and Olivas-Dean's ex parte motion seeking production of financial documents did not address them.

unreasonable. (Code Civ. Proc., § 2034.300 ["Except as provided in . . . .Article[] 4 (commencing with Section 2034.610) . . . , on objection of any party who has made a complete and timely compliance with Section 2034.260, the trial court shall exclude from evidence the expert opinion of any witness that is offered by any party who has unreasonably failed to do any of the following: . . . (b) Submit an expert witness declaration."]; *Bonds, supra,* at p. 146.)

On balance, we cannot say the trial court abused its discretion in implicitly finding Olivas-Dean did not act unreasonably in failing to file a formal motion pursuant to Code of Civil Procedure section 2034.610. Civil Code section 3295, subdivision (c) prohibited pretrial discovery of American's financial condition absent a court order. (See *Mike Davidov, supra,* 78 Cal.App.4th at p. 609 ["We see no problem with a trial court, in its discretion, ordering a defendant to produce evidence of his or her financial condition *following* a determination of the defendant's liability for punitive damages."].) Olivas-Dean could have designated a punitive damages expert earlier, but little would have been gained. American had refused to produce financial documents until the last possible moment—after the jury returned its verdict on the required malice to support them—and only did so by court order. Having vigorously resisted producing evidence of its financial condition, American almost certainly would not have disclosed this information earlier and deposed Lanning on the topic.

As the trial court recognized, the timeline to prepare for the punitive damages phase was tight to ensure the jury could remain empaneled, a laudable goal. The trial court explored all possible options to lessen the impact on American, from securing

the quick exchange of documents to ensuring Lanning would be available to sit for a deposition over the weekend. Yet, American delayed by withholding its financial documents, and then it chose not to depose Lanning or call its own expert witness. Lanning was not unknown to American, and American had a full opportunity to cross-examine him at the punitive damages phase. Lanning testified based on American's own financial records, so American already had the information he used for his opinions. Although American continues to complain that it had insufficient time to locate and retain its own expert, nothing indicates it even tried to do so. American had options to mitigate any perceived prejudice due to the short timeline, but as far as we know, it did nothing.[7] (See *Boston, supra,* 170 Cal.App.4th at p. 954 ["The behavior of the party seeking to exclude the expert testimony is relevant to the reasonableness inquiry. If any unfairness arising from the proffered party's late or incomplete disclosure was exacerbated by the party seeking exclusion, the court is less likely to find the conduct of the party offering the expert to be unreasonable."].) We find no abuse of discretion.

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[7] It is notable the trial court denied a new trial on punitive damages because "the financial documents that were produced by Defendant had been manipulated to depress the financial condition of Defendant and the court finds that Mr. Lanning's assessment of net worth is reasonable and supported by credible testimony."

DISPOSITION

The order granting JNOV on Olivas-Dean's FEHA failure to prevent claim is reversed. The matter is remanded for the trial court to reinstate the original judgment entered on June 6, 2017. The court is directed to hold further proceedings on Olivas-Dean's request for attorney fees. In all other respects, the judgment is affirmed.

Olivas-Dean is awarded costs on appeal.

BIGELOW, P. J.

We concur:

STRATTON, J.

WILEY, J.